IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 561 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

ASLAMKHAN @ KUKDO MARDANKHAN PATHAN

Versus

STATE OF GUJARAT

Appearance:

MRS MADHUBEN SHARMA for Petitioner

Mr. U.R. Bhatt, AGP for Respondent No. 1, 3

RULE UNSERVED for Respondent No. 2

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 01/05/98

ORAL JUDGEMENT

By this application under Article 226 of the Constitution of India, the petitioner calls in question the legality and validity of the order passed by the Police Commissioner for the city of Rajkot on 20th September 1997 invoking his powers under Section 3 (2) of the Gujarat Prevention of Anti-Social Activities Act (for short "the Act"), consequent upon which the petitioner came to be arrested and is at present kept under

detention.

2. Against the petitioner about 3 complaints came to be lodged with Pradumannagar police station and Rajkot City Prohibition police station. As alleged in those cases, the petitioner was found in possession of huge quantity of liquor without any pass or permit. The quantity of liquor was ranging from 20 litres to 210 litres of liquor. The petitioner dealing in liquor was selling and providing liquor to different persons through different agencies, as a result of which the public life was considerably affected and remained disturbed. Mischief with the public health was played. He wanted to expand his liquor business putting people to several hazards. The Commissioner of Police - Rajkot City, found that the public order was being disturbed, because whoever came in the way of the petitioner, had to lick the dust because the petitioner used to retialiate badly. He was beating, torturing, abusing, molesting and making people to bend in his way. Because of his riotous and discommodious activities, no one was ready to come forward to make statement against him. As every one was apprehending danger to his safety and feeling insecured, after considerable persuation, and assurance that necessary particulars disclosing their identity would not be disclosed was given, some of the witness came forward to state against the petitioner. After detailed inquiry, the Commissioner of Police found that nefarious activities of the petitioner shattering and battering public life and leading to anarchy were going berserk. The petitioner was required to be curbed immediately. He thought about different remedial measures available in law so as to curb his subversive activities, but the general law was sounding dull, and the only way found just and most effective was to pass the order of detention and detain the petitioner for certain times. He, therefore, passed the impugned order, consequent upon which the petitioner is at present under detention.

3. The order in question is challenged on several grounds, but at the time of submissions, both the learned advocates tapered off their submissions confining to the only point, namely exercise of privilege under Section 9(2) of the Act. According to the petitioner, no doubt, under that Section it is open to the detaining authority to exercise the privilege and decide whether certain facts should be disclosed or not, but the privilege has to be exercised judiciously and not arbitrarily or capriciously. If without any good cause the particulars are suppressed, it would certainly impair the right of the petitioner to make effective representation. In this

case, no good cause is shown. The petitioner was entitled to have the particulars about the witnesses not given. Had the particulars been given, the petitioner would have represented and pointed out whether the statements recorded are reliable. When his right was jeopardised, his continued detention on that count may be held illegal.

4. In reply to such contention, Mr. U.R. Bhatt, the learned APP submitted that looking to the retaliatory nature of the petitioner and to protect the safety of the witnesses when in the public interest considering all relevant circumstances and materials on record, the privilege is exercised for not disclosing the particulars, the right of the petitioner cannot be said to have been jeopardised. The order being quite in consonance with law is required to be maintained.

5. Before I proceed, it would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention is passed are required to be communicated to the detenu. The detenu is, therefore, required to be informed not merely factual inference and factual material which led to inference namely not to disclose certain facts but also the sources from which the factual material is gathered. The disclosure of sources can enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources would be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act, the detaining authority is of course empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases, where public interest dictating non-discosure overrides the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well-founded for disclosing or not disclosing certain facts or particulars

of those persons, the authority making the order has to make necessary inquiry applying his mind. What can be deduced from such constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether the disclosure of any facts involved therein is against public interest are both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the public interest. If the task of recording statements and necessary inquiry is entrusted to others, and if he mechanically endorses or accepts the recommendation of others or subordinate authority in that behalf without applying mind and taking his own decision, the exercise of power would be vitiated as arbitrary. What is further required is that the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bonafide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal malafides. For my such view, a reference of a decision in the case of Bai Amina, W/o. Ibrahim Abdul Rahim Alla Vs. State of Gujarat and others- 22 G.L.R. 1186 held to be the good law by the Full Bench of this Court in the case of Chandrakant N. Patel Vs. State of Gujarat & Others 35(1) [1994(1)] G.L.R. 761, may be made.

6. In view of such law, the authority passing the detention order has to satisfy the court that it was absolutely necessary in the public interest to protect the witnesses keeping their safety in mind to the factors emerging on record. The affidavit of the detaining authority is not filed. Hence it can be assumed that without any just cause the privilege is exercised and certain particulars are suppressed. Reading the order, itself it appears that the task about the inquiry qua fear expressed by the witnesses was entrusted to the other officer and whatever the other officer reported has been mechanically accepted only on the ground that there was no reason to doubt the report made and also under the assumption that every thing was done in order and honestly report was made and there was, for the detaining

authority, no reason to defer the opinion expressed. In fact, there is no personal application of mind for being satisfied about the exercise of the privilege. The subjective satisfaction is therefore vitiated. In short, the case about non-disclosure exercising the privilege under Section 9(2) of the Act is not made out and therefore the continued detention is illegal. The petitioner for want of the particulars suppressed could not make effective representation. As a result, his right was jeopardised. The continued detention must therefore be held to be illegal and unconstitutional.

7. For the aforesaid reasons, the petition is allowed. The order of detention dated 20th September 1997 is hereby quashed and set aside. The petitioner is ordered to be set at liberty forthwith if not required in any other case. Rule accordingly made absolute.

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(rmr).